



Billing Code: 6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R08-OAR-2010-0406; FRL-9790-8]

Approval and Promulgation of Implementation Plans; North Dakota; Regional Haze State Implementation Plan; Federal Implementation Plan for Interstate Transport of Pollution Affecting Visibility and Regional Haze; Reconsideration

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: On April 6, 2012, EPA published a final rule partially approving and partially disapproving a North Dakota State Implementation Plan (SIP) submittal addressing regional haze submitted by the Governor of North Dakota on March 3, 2010, along with SIP Supplement No. 1 submitted on July 27, 2010, and part of SIP Amendment No. 1 submitted on July 28, 2011. The Administrator subsequently received a petition requesting EPA to reconsider certain provisions in the final rule. Specifically, the petition raised several objections to EPA's approval of the State's best available retrofit technology (BART) emission limits for nitrogen oxides (NO_x) for Milton R. Young Station Units 1 and 2 and Leland Olds Station Unit 2, which are coal-fired power plants in North Dakota.

In this action, EPA is initiating the reconsideration of its approval of the NO_x BART limits for these units, proposing to affirm its approval of these limits, and requesting comment on this proposal. We are not reconsidering or requesting comment on any other provisions of the final rule.

DATES: *Comments:* Comments must be received on or before **[Insert date 60 days from date of publication in the Federal Register]** unless a public hearing is held, which would extend the

comment period (see below).

Public Hearing: If anyone contacts EPA requesting to speak at a public hearing by April 8, 2013, a public hearing will be held in May 2013 in Bismarck, North Dakota. If a public hearing is held, the record for this action will remain open for 30 days after the hearing to accommodate submittal of information related to a public hearing and any other comments on this action, and EPA will publish a document in the Federal Register extending the comment period. For more information on a public hearing and requests to speak, see the **GENERAL INFORMATION** section of this preamble.

ADDRESSES: Submit your comments, identified by Docket ID No. **EPA-R08-OAR-2010-0406**, by one of the following methods:

- <http://www.regulations.gov>. Follow the on-line instructions for submitting comments.
- E-mail: r8airrulemakings@epa.gov.
- Fax: (303) 312-6064 (please alert the individual listed in the **FOR FURTHER INFORMATION CONTACT** section if you are faxing comments).
- Mail: Director, Air Program, Environmental Protection Agency (EPA), Region 8, Mailcode 8P-AR, 1595 Wynkoop Street, Denver, Colorado 80202-1129.
- Hand Delivery: Director, Air Program, Environmental Protection Agency (EPA), Region 8, Mailcode 8P-AR, 1595 Wynkoop Street, Denver, Colorado 80202-1129. Such deliveries are only accepted Monday through Friday, 8:00 a.m. to 4:30 p.m., excluding federal holidays. Special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. **EPA-R08-OAR-2010-0406**.

EPA's policy is that all comments received will be included in the public docket without

change and may be made available online at <http://www.regulations.gov>, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through <http://www.regulations.gov> or e-mail. The <http://www.regulations.gov> Web site is an “anonymous access” system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA, without going through <http://www.regulations.gov>, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA’s public docket visit the EPA Docket Center homepage at <http://www.epa.gov/epahome/dockets.htm>.

Docket: All documents in the docket are listed in the <http://www.regulations.gov> index. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in <http://www.regulations.gov> or in hard copy at the Air Program, Environmental Protection Agency (EPA), Region 8, 1595 Wynkoop Street,

Denver, Colorado 80202-1129. EPA requests that if at all possible, you contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section to view the hard copy of the docket. You may view the hard copy of the docket Monday through Friday, 8:00 a.m. to 4:00 p.m., excluding federal holidays.

FOR FURTHER INFORMATION CONTACT: Gail Fallon, EPA Region 8, at (303) 312-6281, or Fallon.Gail@epa.gov.

SUPPLEMENTARY INFORMATION:

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Definitions

For the purpose of this document, we are giving meaning to certain words or initials as follows:

- The word Act or initials CAA mean or refer to the Clean Air Act, unless the context indicates otherwise.
- The initials ASOFA mean or refer to advanced separated overfire air.
- The initials BACT mean or refer to best available control technology.
- The initials BART mean or refer to best available retrofit technology.

- The initials EGU mean or refer to electric generating unit.
- The words we, us or our or the initials EPA mean or refer to the United States Environmental Protection Agency.
- The initials FIP mean or refer to federal implementation plan.
- The initials LOS mean or refer to Leland Olds Station.
- The initials MRYS mean or refer to Milton R. Young Station.
- The words North Dakota and State mean the State of North Dakota unless the context indicates otherwise.
- The initials NO_x mean or refer to nitrogen oxides.
- The initials PSD mean or refer to prevention of signification deterioration.
- The initials SCR mean or refer to selective catalytic reduction.
- The initials SIP mean or refer to state implementation plan.
- The initials SNCR mean or refer to selective non-catalytic reduction.

I. General Information

A. What Should I Consider as I Prepare My Comments for EPA?

1. *Submitting CBI.* Do not submit CBI to EPA through <http://www.regulations.gov> or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD ROM that you mail to EPA, mark the outside of the disk or CD ROM as CBI and then identify electronically within the disk or CD ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the

public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for Preparing Your Comments.* When submitting comments, remember to:

- a. Identify the rulemaking by docket number and other identifying information (subject heading, Federal Register date and page number).
- b. Follow directions - The agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.
- c. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.
- d. Describe any assumptions and provide any technical information and/or data that you used.
- e. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.
- f. Provide specific examples to illustrate your concerns, and suggest alternatives.
- g. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.
- h. Make sure to submit your comments by the comment period deadline identified.

B. What Information Should I Know About a Public Hearing?

EPA will hold a public hearing on today's document only if it receives a request to present oral testimony on the issues addressed in today's document by April 8, 2013. Any person wishing to present oral testimony should notify Ms. Gail Fallon at (303) 312-6281 by 5 p.m. mountain time on April 8, 2013. If a public hearing is held, it will be held in May 2013 in

Bismarck, North Dakota. We will post information on the specifics on our Web site at <http://www.epa.gov/region8/air/> and by publishing a Federal Register document at least 15 days before the date of the hearing. The document announcing a hearing would also extend the public comment period for 30 days following the date of the public hearing. A public hearing would provide interested parties the opportunity to present data, views, or arguments concerning this document.

Interested parties may also submit written comments, as discussed in the proposal. Written statements and supporting information submitted during the comment period will be considered with the same weight as any oral comments and supporting information presented at a public hearing. We will not respond to comments during a public hearing, may limit oral testimony to five minutes, and will not provide equipment for showing overhead slides or computerized slide presentations. When we publish our final action, we will provide written responses to all oral and written comments received on our proposal.

II. Background

On March 3, 2010, the State of North Dakota submitted a regional haze SIP submittal for approval into the North Dakota SIP.¹ The SIP included the State's NO_x BART determinations for Milton R. Young Station (MRYS) Units 1 and 2 and Leland Olds Station (LOS) Unit 2. Based on its conclusion that selective non-catalytic reduction (SNCR) plus advanced separated overfire air (ASOFA) represented BART at these units, the State adopted NO_x BART limits of 0.36, 0.35, and 0.35 pounds per million British thermal units (lb/MMBtu), respectively, on a 30-day rolling average basis. The State rejected selective catalytic reduction (SCR), a more effective NO_x control technology, as BART.

¹ For a full discussion of regional haze requirements, please see our proposal at 76 FR 58574, 58576.

In our proposed action, we proposed to disapprove the State's NO_x BART determinations for these units. See 76 FR 58570, 58573 (September 21, 2011). In our final rule, we changed our position and approved the State's NO_x BART determinations for these units. 77 FR 20894, 20897 (April 6, 2012). We based our change on a December 21, 2011, U.S. District Court decision that was issued after the close of the public comment period. *Id.* at 20897-20898.

On June 4, 2012, Earthjustice, on behalf of the National Parks Conservation Association and the Sierra Club, submitted a petition for reconsideration of our final rule under section 307(d)(7)(B) of the CAA requesting that EPA reconsider its approval of the State's NO_x BART determinations for MRYS Units 1 and 2 and LOS Unit 2. The petition asserts that the environmental groups were unable to raise their objections to EPA's reliance on the District Court decision during the comment period because of the timing of that decision and that their objections are of central relevance to EPA's final rule because EPA relied on the District Court decision in explaining the basis for its final rule. In a letter to Earthjustice dated November 19, 2012, EPA granted reconsideration of its final rule in order to allow for public comment on the specific issues raised in the petition. In that letter, we indicated that we would publish a notice of proposed rulemaking to address the State's NO_x BART determinations and limits for the three units as part of a reasonable progress analysis.

III. Today's Action

A. Reconsideration and Proposal to Affirm

EPA is initiating the reconsideration of its approval of the State's NO_x BART determination and limits for MRYS Units 1 and 2 and LOS Unit 2 and proposing to affirm its approval of the determination and limits. We are not reconsidering or requesting comment on any other provisions of the final rule.

B. Rationale for Our Proposal to Affirm

On July 27, 2006, the U.S. District Court for the District of North Dakota entered a consent decree between EPA, the State, and Minnkota Power Cooperative (“Minnkota”). The consent decree resulted from an enforcement action that EPA and the State brought against Minnkota for alleged violations of prevention of significant deterioration (PSD) permitting requirements at MRYS Units 1 and 2. The consent decree called for North Dakota to make a best available control technology (BACT) determination for NO_x for MRYS Units 1 and 2 and provided a dispute resolution procedure in the event of disagreement regarding the BACT determination.

In November 2010, North Dakota determined BACT for NO_x to be limits of 0.36 lb/MMBtu for MRYS Unit 1 and 0.35 lb/MMBtu for MRYS Unit 2 based on the use of SNCR technology, with separate limits during startup. In reaching this decision, North Dakota eliminated SCR as BACT based on its finding that SCR was not technically feasible to control emissions from an electric generating unit (EGU) burning North Dakota lignite coal. In particular, North Dakota noted that no SCR has ever been employed on an EGU burning North Dakota lignite, that North Dakota lignite has unique properties that have the potential to quickly degrade the SCR catalyst, and that no catalyst vendor supplied with the specifications for the coal at MRYS Units 1 and 2 would provide a guarantee of catalyst life without first conducting slipstream or pilot tests at MRYS.

EPA disagreed with North Dakota’s findings and the selection of SNCR as BACT and initiated the dispute resolution process under the consent decree. Under the consent decree, the court was to uphold North Dakota’s BACT determination unless the disputing party was able to demonstrate that North Dakota’s decision was unreasonable.

On December 21, 2011, following briefing by the parties, and consideration of North Dakota's record for its BACT determination, the court determined that EPA had not demonstrated that North Dakota's findings were unreasonable.² The court decided that North Dakota, based on the administrative record for its BACT determination, had a reasonable basis for concluding that SCR is not technically feasible for treating North Dakota lignite at MRYS. *Id.* The court upheld North Dakota's determination that SNCR is BACT. *Id.*

Two critical principles expressed in our BART guidelines³ are relevant here. First, as part of a BART analysis, technically infeasible control options are eliminated from further review. For BART, EPA's criteria for determining whether a control option is technically infeasible are substantially the same as the criteria used for determining technical infeasibility in the BACT context. 70 FR 39165; EPA's "New Source Review Workshop Manual," pages B.17–B.22.⁴ In the BART context, a technology is feasible if it is available and applicable. 70 FR 39165. A technology is available if it can be obtained through commercial channels. An available technology is applicable if it can reasonably be installed and operated on the source under consideration. *Id.* The BACT analysis for technical feasibility employs the same approach. It, too, uses the concepts of availability and applicability and defines those terms in the same manner as the BART guidelines.

The second critical principle is that states generally may rely on a BACT determination

² Order Denying Plaintiff's Motion to Stay and Motion for Dispute Resolution, United States, et al., v. Minnkota Power Cooperative, Inc., et al., United States District Court for the District of North Dakota, Southwestern Division, Civil Action No. 1:06-cv-034, Docket EPA-R08-OAR-2010-0406-0365.

³ Among other things, EPA's BART guidelines, codified at 40 CFR part 51, appendix Y, describe a set of steps for determining BART. CAA section 169A(b)(2) requires that BART be determined pursuant to the BART guidelines for power plants with a total generating capacity over 750 megawatts. With respect to other BART sources, the BART guidelines reflect EPA's interpretations regarding certain key principles related to BART, including the two principles described in the text.

⁴ See docket EPA-R08-OAR-2010-0406-0038.

for a source for purposes of determining BART for that source, unless new technologies have become available or best control levels for recent retrofits have become more stringent. 70 FR 39164. As a general rule, the selection of a recent BACT level as BART is the equivalent of selecting the most stringent level of control, and consideration of the five statutory BART factors becomes unnecessary.

In deciding our challenge to the information and analyses relied upon by North Dakota, the U.S. District Court upheld North Dakota's recent BACT determination based on the same technical feasibility criteria that apply in the BART context. In light of the court's decision and the views we have expressed in our BART guidelines on the relationship of BACT to BART, we concluded in our final rule that it would be inappropriate to proceed with our proposed disapproval of SNCR as BART and our proposed federal implementation plan (FIP) to impose SCR at MRYS Units 1 and 2 and LOS Unit 2. 77 FR 20898. While LOS Unit 2 was not the subject of the BACT determination, the same reasoning that applies to MRYS Units 1 and 2 also applies to LOS Unit 2. It is the same type of boiler burning North Dakota lignite coal, and North Dakota's views regarding technical infeasibility that the U.S. District Court upheld in the MRYS BACT case apply to it as well.

While we do not view the U.S. District Court's decision regarding technical infeasibility as legally binding concerning our evaluation of the State's BART determinations at MRYS Units 1 and 2 and LOS Unit 2, we find it appropriate, under the unique circumstances involved here, to accord substantial weight to the District Court's decision and the State's BACT determination. The District Court evaluated competing arguments advanced by the State, Minnkota, and EPA,

as well as an extensive record,⁵ and concluded that the State had not reached an unreasonable conclusion about technical feasibility. The District Court affirmed the State's choice of SNCR plus ASOFA as BACT. Our BART guidelines indicate that recent BACT determinations generally may be considered BART without further analysis. Based on these facts, we are not acting arbitrarily or capriciously, or unreasonably, in determining that the State's selection of SNCR plus ASOFA as BART at MRYS Units 1 and 2 and LOS Unit 2 is reasonable and should be approved.⁶ We note that evaluations of technical feasibility often change over time and that we may reach a different conclusion about the technical feasibility of SCR at these plants in the future as part of a reasonable progress analysis. The regional haze program requires additional reasonable progress reviews over time on the multi-year path for states to reach the ultimate visibility goal of the CAA.

IV. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review and Executive Order

13563: Improving Regulation and Regulatory Review

This action would merely approve state law as meeting federal requirements and would impose no additional requirements beyond those imposed by state law. In this reconsideration, EPA is proposing to affirm its prior approval of North Dakota SIP requirements for two sources in North Dakota. This type of action is exempt from review under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011).

B. Paperwork Reduction Act

⁵ We note that the State submitted the record from the BACT proceeding to us on July 28, 2011 as a SIP revision and again during the comment period on our September 21, 2011 notice of proposed rulemaking on the State's regional haze SIP.

⁶ The associated BART limits are 0.36 lb/MMBtu for MRYS Unit 1, 0.35 lb/MMBtu for MRYS Unit 2, and 0.35 lb/MMBtu for LOS Unit 2, on a 30-day rolling average basis. The SIP contains separate limits for MRYS Units 1 and 2 during startup of 2070.1 and 3995.6 pounds per hour, respectively, on a 24-hour rolling average basis. See SIP section 7.4.2, p. 74.

This action does not impose an information collection burden under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* Burden is defined at 5 CFR 1320.3(b).

Because the action applies to just two facilities, the Paperwork Reduction Act does not apply.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For purposes of assessing the impacts of today's action on small entities, small entity is defined as: (1) a small business as defined by the Small Business Administration's (SBA) regulations at 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of this action on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. In this reconsideration, EPA is proposing to affirm its prior approval of North Dakota SIP requirements for two sources in North Dakota. The proposed action, if finalized, merely would approve state law as meeting federal requirements and would impose no additional requirements beyond those imposed by state law. We continue to be interested in the potential impacts of the proposed rule on small entities and welcome comments on issues related to such impacts.

D. Unfunded Mandates Reform Act (UMRA)

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1531-1538, requires federal agencies, unless prohibited by law, to assess the effects of their regulatory actions on state, local, and tribal governments and the private sector. The action imposes no enforceable duty on any state, local or tribal governments or the private sector. In this reconsideration, EPA is proposing to affirm its prior approval of North Dakota SIP requirements for two sources in North Dakota. The proposed action, if finalized, merely would approve state law as meeting federal requirements and would impose no additional requirements beyond those imposed by state law.

This action is also not subject to the requirements of section 203 of UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments. Again, in this reconsideration, EPA is proposing to affirm its prior approval of North Dakota SIP requirements for two sources in North Dakota. The proposed action, if finalized, merely would approve state law as meeting federal requirements and would impose no additional requirements beyond those imposed by state law.

E. Executive Order 13132: Federalism

This action would not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132, because, if finalized, it merely would approve state law as meeting federal requirements and would impose no additional requirements beyond those imposed by state law. Thus, Executive Order 13132 does not apply to this action. In the spirit of Executive Order 13132, and consistent with EPA policy to promote communications between EPA and state and local governments,

EPA specifically solicits comment on this action from state and local officials.

F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

This action does not have tribal implications, as specified in Executive Order 13175 because it does not impose substantial direct compliance costs and does not preempt tribal law. In this reconsideration, EPA is proposing to affirm its prior approval of North Dakota SIP requirements for two sources in North Dakota. The proposed action, if finalized, merely would approve state law as meeting federal requirements and would impose no additional requirements beyond those imposed by state law. Thus, Executive Order 13175 does not apply to this rule. EPA specifically solicits additional comment on this action from tribal officials.

G. Executive Order 13045: Protection of Children from Environmental Health Risks and Safety Risks

This action is not subject to EO 13045 (62 FR 19885, April 23, 1997) because it implements specific standards established by Congress in statutes. In addition, it is not an economically significant regulatory action because it applies to only two facilities and merely proposes to approve state law as meeting federal requirements; it would impose no additional requirements beyond those imposed by state law. This action would not present a disproportionate health or safety risk to children.

H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

This action is not subject to Executive Order 13211 (66 FR 28355 (May 22, 2001)), because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act

Section 12 of the National Technology Transfer and Advancement Act (NTTAA) of 1995 requires federal agencies to evaluate existing technical standards when developing a new regulation. To comply with NTTAA, EPA must consider and use “voluntary consensus standards” (VCS) if available and applicable when developing programs and policies unless doing so would be inconsistent with applicable law or otherwise impractical.

VCS are inapplicable to this action because application of those requirements would be inconsistent with the Clean Air Act.

J. Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations

Executive Order 12898 (59 FR 7629, February 16, 1994), establishes federal executive policy on environmental justice. Its main provision directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States.

We have determined that this action, if finalized, will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it increases the level of environmental protection for all affected populations without having any disproportionately high and adverse human health or environmental effects on any population, including any minority or low-income population. The action, if finalized, merely would approve state law as meeting federal requirements and would impose no additional requirements beyond those imposed by state law.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Intergovernmental relations, Incorporation by reference, Nitrogen dioxides, Particulate matter, Reporting and recordkeeping requirements, Sulfur dioxide, Volatile organic compounds.

Dated: March 8, 2013.

Bob Perciasepe,
Acting Administrator.

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